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MALABAR LAW: INDIVIDUAL PROPERTY AND SUCCESSION.

As under the Hindu Law, so under the Marumakkathayam and Aliyasanthana systems joint holding is the rule and individual holding the exception and it is for the individual member who sets up separate title to make it out. *Mari Veetil Chathu Nair* v. *Mari Veetil Sekaran Nair* [1], *Virarayan* v. *Valia Rani of Pudia Kovilagam* [2], S. A. 970 of 1883, S. A. 1150 of 1883, *Govinda Panikker* v. *Nani* [3], *Thimmakka* v. *Parameshri* [4], *Dharnu Shetti* v. *Dejamma* [5]. The strength of the presumption would no doubt vary according to circumstances. A karnavan who is in possession of family funds, for instance, would be presumed to have made all his acquisitions with them for the benefit of the family and in his case the presumption would be very strong. (*Kallati Kunju Menon* v. *Palat Erracha Menon* [6], *Kunhanna* v. *Timmaju* [7]). The discussion as to a nucleus and the burden of proving its existence or the contrary is common to the ordinary Hindu Law and these systems and need not detain us. If it is proved that there was no family property from which the property in question could have been acquired, that undoubtedly would rebut the presumption of family acquisition but it is not sufficient to show that the family funds alone cannot account for the acquisition. *Thimmakka* v. *Parameshri* [4]. For it must be borne in mind that when there is a mixing up of the family funds and separate funds the presumption is that the latter is merged in the former. It may be guessed as under the Hindu Law that an inconsiderable contribution from the family funds will not affect the nature of the acquisition. It could not in those circumstances be said that the family property was

1. (1909) I. L. R. 33 M. 250.
2. (1881) I. L. R. 3 M. 141.
3. (1911) I. L. R. 36 M. 304 (footnote).
4. (1910) M. W. N. 297 = 7 I. C. 145.
5. (1916) 5 L. W. 259.
6. (1864) 2 M. H. C. R. 162.
7. (1914) 27 M. L. J. 60.

instrumental to the acquisition. (See Strange, Vol. 1, p. 213; *Lakshman Mayaram* v. *Jamnabai* [1]. As said in books of Hindu Law "things of ordinary value may be given up for they are mere chaff." (*de minimis non curat lex*); for instance in the practice of agriculture, it is said, taking a rope for his plough out of the common stock would not invalidate his pretensions to an exclusive right. Nor would the fact that the money is raised on the credit due to the relation of the manager to the family property be a reason for holding that the property acquired is family property. It would be otherwise if the amount is raised by pledging family property. A member of the family making improvements on the family property, *Kannan* v. *Tenju* [2], or raising crops on the family property, *Vishnu Nambudri* v. *Akkamma* [3], cannot of course claim them. They will be regarded as accretions to the family property; otherwise, if the lands are held on lease from the family. Acquisitions out of maintenance allowances or out of the income of the land allotted for that purpose should, we think, be similarly treated as self-acquisitions. The case may vary if it is only an improvement of the family property in his possession for maintenance for then the simple case would be complicated by the principle of merger.

Modern conditions are likely to raise more complicated problems. The following are some such. Suppose the managing member purchases property in his own name as self-acquisition or in the name of another intending to make a gift to that other partly with family funds and partly with his own funds? If the purchase is entirely with the family funds both according to the principles of Hindu law and of S. 63 of the Indian Trusts Act, the acquisition will enure for the benefit of the family, but in the case put, is the principle of S. 66 of the Trusts Act giving a charge to the family to be applied or should the property be held to belong to the family? Again, suppose the managing member starts a venture with the family funds and succeeds by expending his labour and skill in making it a big success; is the family to be entitled to the whole business or is it to be held entitled to the funds contributed with interest or corresponding profits at its option. Here again, at the time of starting the business the

1. (1882) I. L. R. 6 Bom. 225.

2. (1882) I. L. R. 5 M 1

3. (1913) I. L. R. 34 M. 496.

manager may have disclosed his intentions with regard to the business whether it should be his own private concern or that of the family or there may be circumstances from which his intention may be inferred. Among the circumstances pointing one way and the other would be his raising money by pledging the credit of the family, or on his own personal credit, treating the capital contributed by the family in the books of the business as capital or only as a loan, the nature of the investment whether authorised or unauthorised, participation of the family members in the conduct of the business &c. The managing member is not bound to contribute his labour, skill or capital for the benefit of the family but if he does not declare his intention to reserve the benefit for himself he will be presumed not to do so. If he declares his intention to reserve it, the capital he would certainly be entitled to have. *Thimmakka* v. *Akku* [1]. Whether he should have the improved fund for himself and whether he would be entitled to get the benefit of his labour and skill would depend upon circumstances. The test in such a case, we think, should be—what is substantially instrumental in the acquisition of the new property. If the capital is the main thing and the family has contributed it in spite of the declaration of the intention to charge for labour and skill we think the family should get the property. For, in the absence of a contract, the managing member would not be entitled to charge for his services and where the result of his services is not separable from the family fund, he cannot have any portion of the improved fund. But when his own capital forms the bulk or his labour and skill form the chief or main cause of the new fund, the family we think should only be entitled to the fund contributed with interest or proportionate profits at their option. In cases of doubt where it is difficult to say whether it is the capital or the skill that is the main cause, having regard to the fiduciary position of the Karnavan the family should have the benefit of the doubt. Where a deceased partner's share is continued to be used in the partnership, the rule followed is that the representatives are given at their option interest on the fund or the share of the profits that can appropriately be assigned to the capital contributed, proper deduction being made for the skill and labour of the surviving partners. The privileges and immunities attaching to the position of the managing member, we think, require that he

1. (1910) I. L. R. 34 M. 481.

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should not be permitted to get any remuneration for his services unless he is able to show that his labour and skill are the main causes of the acquisition. Applying the same principles, where the property is purchased out of a mixed fund and the family contribution forms the bulk, the family should have the benefit of the property and the member only a charge for his money.

The presumption above referred to applies equally strongly to junior members who are in joint or exclusive management of the family property or otherwise have the handling of the family funds. *Sanku* v. *Puthumma* [1], *Thimmakka* v. *Akku* [2], *Thimmakka* v. *Parameshri* [3]. In Travancore the presumption is that property standing in the name of the junior members belongs to them exclusively and the family has to show that they had management or handling of the family funds. *Kanaku Parameswaran Kesavan* v. *Govindan* [4], *Raman Govindan* v. *Parvathi* [5], *Narayanan Raman* v. *Govindan Kesavan* [6]. Here on the other hand, the presumption is stated to be the other way in a number of cases referred to at the beginning of the article. In *Govinda Panikker* v. *Nani* [7] Benson and Sundara Iyer, JJ. however state "We do not understand these cases as laying down that there is any presumption of law either way. The presumption is one of fact and whether a presumption in favour of the property being Tarward property should be drawn or not in any particular case would depend on various circumstances such as the relationship of the member in whose name the title stands to the karnavan at the time of the acquisition of the property in question, the possession of private means by the junior member, the existence of family funds at the time of the acquisition." In *Thimmakka* v. *Parameshri* [8], the learned Chief Justice is not prepared to say that the presumption is one of law. But it must be noticed that in the leading case on burden of proof, *Dhuram Das Pande v. Mussamut Shama Soondri Debia* [9], which has been followed by the Privy Council quite recently in *Parbati Dasi* v. *Baikunta Nath De* [10], the presumption is stated to be a presumption of law. There, Lord Campbell says :—It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is

1. (1890) I. L. R. 14 Mad. 289.
2. (1910) I. L. R. 34 Mad. 481.
3. (1910) M. W. N. 297.
4. 22 T. L. R. 121.
5. 22 T. L. R. 178.
6. 26 T. L. R. 190.
7. (1911) I. L. R. 36 M. 304.
8. (1910) M. W. N. 297.
9. (1843) 3 M. I. A. 229.
10. (1913) 26 M. L. J. 248.

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allowed that they had some joint property and that there can be no doubt that under these circumstances, the presumption o law is that all the property they were in possession of was joint property until it was shown by evidence that one member of the family was possessed of separate property." In the latest case this is what their Lordships say—"there was no evidence that Rup Charan had any separate funds or that the properties in dispute were purchased with money belonging to him. In the absence of such evidence the presumption is clearly decisive that they were acquired by the father in the name of the son and that they were not the self-acquired properties of Rup Charan (junior member)." *Parvati Dasi* v. *Baikunta Nath De* [1]. Referring to this case and explaining *Govinda Panikker* v. *Nani* [2], Sir John Wallis, C. J. and Burn, J. say in *Dhurani Shetti* v. *Dejamma* [3] "we understand, the learned Judges in *Govinda Panikker* v. *Nani* merely to lay down that the right way to approach the case is to look at all the facts and the circumstances of the particular case and raise the presumption accordingly.* * * The view of the Dt. Judge is opposed to the very recent decision of the Privy Council in *Parvati Dasi* v. *Baikunta NathDe* [4]". The view of the Dt.Judge based on *Govinda Panikker* v. *Nani* [2] which was dissented from was that there could not be any presumption that the properties were Tarward properties unless the particular member was shown to have no private means or the family was shown to have had funds which disappeared after the acquisition. In the absence of proof of nucleus the presumption would, of course, be of the most attenuated character but where a possible source of acquisition is proved, the effect of the Privy Council decision would seem to be to throw the onus on the junior member to show that he either had separate funds or that the property was purchased out of separate funds. He may perhaps also show that no family property was in his possession or that even if it was, it was too insignificant to have substantially contributed to the acquisition. In the case of the karnavan, a higher degree of proof than mere possession of separate funds, we think, should be required. The ratio of the presumption in the case of the junior member is traced in *Virarayan* v. *Valia Rani of Pudia Kovilagam* [4] in effect to the general practice of handing over the management of portions of family property to junior members. As a point of history, it may have deeper roots.

1. (1913) 26 M. L. J. 248.
2. (1911) I. L. R 36 M. 304.
3. (1911) 5 L. W. 229.
4. (1881) I. L. R. 3 M. 141.

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The old theory referred to in Manu of son's wife and slaves being Nirdhanas (i.e. without property) and their property belonging to the head of the family may be the real source of it. It will be seen that the karnavan's position, and even the history of its evolution present many analogies to that of the father under the Hindu Law. If at all, the authority of the karnavan is not less but more absolute than that of the father.

The presumption above referred to can ordinarily have no application to gifts. In the case of Putravakasam gifts some such presumption is applied in Travancore (*Kozhi Thoma v. Narayanan Krishnan* [1]) but the British courts have not yet done so. Gifts to wife and children though children are not in existence at the time are no doubt held to be branch property but this is really not an exception. This aspect of the case we have already discussed while considering branch property. The presumption cannot have application to transactions in which family funds are not used or at least family interests are not involved. The Karnavan taking, for instance, a land from strangers on Verumpattam lease could hardly be presumed to be acting for the family but the lease of a land on which the family has been living or of land though alienated in which the family still retains some interest and hopes some day to redeem might stand on a different footing. Acquisition of property would not be one of the duties of the Karnavan except as a method of investing family funds or unless personal needs of the family require it, the more so where the acquisition is one of onerous or speculative kind. In the case of grants from Government on Darkhast by reason of contiguity to family land or cultivation at family expense courts would readily infer, of course, acquisition in a representative capacity. It is only when the acquisition does not involve any detriment to the family, not necessarily to family property—detriment to family goodwill will suffice—that the court will infer a grant to the Karnavan individually. As held in *Subbayya v. Chellamma* [2] even where the acquisition is gratuitous, if the property is subsequently improved the burden would be on the manager to show that the improvement was not at the family expense and the property had not thereby become family property. It is doubtful if ordinarily these considerations will apply to acquisitions on Dharkhast by junior members not in possession of family property and without the connivance of the manager.

1. 22 T. L. R. 239. 2. (1886) I. L. R. 9 M. 477.

As under the Hindu law, once the prevalent theory under the Malabar law also was that the kārnavan could not alienate immoveable property acquired by himself. (See S. A. No. 27 of 1859.) The same rule was applied later on to acquisitions of all members. S. A. No. 88 of 1859; S. A. No. 85 of 1860. But in 1863, Phillips and Holloway, JJ. held that "self-acquisitions are his separate property and may be charged by him for his personal debts" Moore's Malabar Law, page 175. But at the same time they retained so much of the old theory, viz., that after his death, they lapse into the Tarward property. In *Kallati Kunja Menon* v. *Palat Erracha Menon* [1], the same proposition was reaffirmed by Scotland, C. J. and Holloway, J. There they say "it is unquestionably Malabar law that all the acquisitions of any member of a family undisposed of at his death, form part of the family property, that they do not go to the nephews of the acquirer but fall as other property does to the management of the eldest surviving male. It is however as unquestionably law that the acquirer is fully entitled to hold, encumber and fully dispose in his life-time of his self-acquisitions." This doctrine of lapse, Mr. Justice Holloway had already applied to ordinary Hindu co-parcenaries in *Varadiperumal Udayan* v. *Ardanari Udayan* [2], but was overruled by the Privy Council in the Sivaganga case. His dictum in *Kallati Kunju Menon* v. *Palat Erracha Menon* [1], as to lapse was however followed by Innes and Muthuswami Iyer JJ. in S. A. 534 of 1878 where it was ruled that the acquirer could not dispose of his self-acquisition by will. Nevertheless they held that the Tarward was liable for the debts of the acquirer. In *Ryrappan Nambiar* v. *Kelu Kurup* [3], the bearing of the *Sivaganga case* [4] was noticed by Innes and Muthuswami Iyer, JJ. but their Lordships still refer to the property as lapsing to the Tarwad. However they draw the right inference therefrom, viz., that the property is taken by the Tarward as heirs of the acquirer. In *Alami* v *Komu* [5] the will of the last surviving member of a Tarward was upheld. Mr. Justice Muthuswami Iyer relies for that conclusion upon the Sivaganga case and his own decision in *Ryrappan Nambiar* v. *Kelu Kurup* [3]. In *Kattyassan* v. *Mayan* [6], the point again arose but was

1. (1864) 2 M. H. C. 162.
2. (1868) 1 M. H. C. 412.
3. (1881) I. L. R. 4 M. 150.
4. 9 M. I. A. 543.
5. (1888) I. L. R. 12 M. 126.
6. (1891) I.L.R. 14 M. 495.

left open. In *Achutan Nair* v. *Cheriotti Nayar* [1], the point was again directly raised and it was decided that self-acquired property could be disposed of by will. That result was arrived at by the application of the following principles (1) that the acquirer could dispose of the property, (2) that the Tarwad had no joint interest therein, (3) that whatever a person could validly dispose of by gift *inter vivos* he could dispose of by will. The rule laid down in this case was adopted by the legislature in Act V of 1898.

The other species of individual property usually met with are (*a*) property allotted at partition (*b*) tarward property in the hands of the last surviving member, (*c*) inherited property. When property is inherited by undivided groups, they will of course take as groups with the incidents of Tarwad property but where the individuals composing them are divided inter se or where there is only one individual entitled to inherit inheritance becomes a source of acquisition for individuals. So far as power of disposition *inter vivos* or testamentary is concerned these distinctions do not matter. In one view, they signify as to intestate succession. One other mode of acquisition which needs consideration is prescription. Ordinarily of course this mode of acquisition stands on the same footing as gift but if the title set up is family title, or the circumstances are such as to raise the inference of prescription for the family, the benefit of the prescription accrues to the family. For instance where the family is the lessee, and the Karnavan encroaches on adjoining waste land the very presumption of law that makes it a part of the holding would make it also a part of the family property. These questions are by no means peculiar to Malabar Tarwards, and the same solutions would answer for both the Malabar and the ordinary Hindu systems.

TESTAMENTARY SUCCESSION.

When dealing with the power of testamentary disposition over self-acquired property we have in a way touched on the question of testamentary succession. In *Alami* v. *Komu* [2], the learned Judges go fully into the matter and show that wills were common from very early times in Malabar. There is an allusion to the practice in Major Walker's Report in 1802 and a similar allusion also in the fifth Report. The wills produced in the case dated from 1826. There does not

1. (1897) I.L.R. 22 M. 9. 2. (1888) I. L. R. 12 M. 126.

seem to have been any doubt at any time as to the power of wiling away property in the absence of heirs. In 1837 a will bequeathing self-acquisition to nearer heirs to the exclusion of remoter ones was upheld. In 1843 the Sudder Court thought apparently that all property could be willed away if no title thereto in the claimant during the acquirer's lifetime, was made out. As to self-acquisition, there was a veering of opinion subsequently but ultimately power of disposition was admitted. The last surviving member's right was established in *Alami* v. *Komu* [1] The case of such property could hardly be distinguished in principle from that of property allotted at partition. But all this discussion is rendered unnecessary by the enacting of Act V. of 1893. It is a declaratory Act. It applies to persons domiciled in Madras and who are governed by the Marumakkathayam and Aliyasanthana laws of inheritance. (Sec. 3) Every person of sound mind and not a minor (*i.e.*, aged 18 years, Sec. 2) may by will dispose of the property which he could legally alienate by gift *inter vivos* and is deemed to have been always competent to dispose of such property. Sec. 5 invalidates wills obtained by fraud, collusion or such importunity as takes away free agency. S. 6 provides for revocation. Sec. 8 et seq., provide rules for execution, attestation, revocation, alteration and revival of wills. S. 7 provides that nothing contained in S. 4 shall (a) affect any right established before the commencement of the Act by any court of competent jurisdiction (b) or authorise a testator to deprive any persons of the right of maintenance or (c) affect any law of the intestate succession or authorise any testator to create in the property any interest which he could not have created before the Act. The exact significance of the last clause is not clear. Possibly it was thereby intended to prevent the application of ordinary rules of succession to cases to which the rule of survivorship or lapse had been previously applied. The right of maintenance referred to is apparently the right conferred by S. 17 of the Malabar Marriage Act.

(*To be continued.*)

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1. (1888) I. L. R. 12 M. 126.

SUMMARY OF ENGLISH CASES.

Gill *v.* **Carson and Nield**: (1917) 2 K. B. 674.

Highway—Obstruction—What constitutes—Offence— Town Police Clauses Act, 1847 (10 and 11 Vic. C. 89) S. 28.

To constitute the offence of wilfully causing an obstruction in a public thoroughfare within the meaning of S. 28 of the Town Police Clauses Act there must be an unreasonable user of the highway. For a person merely to stand still, or to cause his horse and cart to stand still in the roadway is not causing an obstruction. It is, however, not necessary that any person should be actually obstructed; it is sufficient if there is proof that in the ordinary course persons may be obstructed, and that the actual use of the road was calculated to obstruct.

Anglo Russian Merchant Traders and John Batt and Co., *In re*: (1917) 2 K. B. 679.

Damages—Contract for shipment of goods—Prohibition against export without a licence—Implied term of the contract —Failure of vendor to obtain licence—Shipment from foreign country—Defence of the Realm (Consolidation Regulations) 1914, Reg. 30 A.—Effect of—Vendor not liable in damages.

By a contract made on 19-8-1915, defendants sold to plaintiffs, both parties being resident in England, 50 tons of aluminium, "to be shipped by steamers to Vladivostock during December-January next. Price, 180 £. per ton, cost and freight to Vladivostock......Payment, cash against documents by London Bank." At the date of the contract there was to the knowledge and in the contemplation of the sellers and buyers a prohibition of export of aluminium from England except on licence granted by the Crown. On and after 7-12-1915, it was made illegal by an order under Regn. 30 A. of the defence of the Realm (Consolidation) Regulations, 1914, for any person in England to buy sell or deal in aluminium, whether or not such sale, purchase, or dealing was to be effected in the United Kingdom, without a permit from the Crown. The sellers duly applied for a licence to export aluminium from England but a license was refused. The failure of the defendants to ship was due to their inability to obtain a licence. It was also found that the defendants did not, after 7-12-1915, apply for a permit to purchase aluminium in America so as to ship it from there and even if they had

so applied, the Government of England would not have granted a permit. In an action for damages for breach of contract :—

Held that the contract did not impose upon the sellers an absolute obligation to ship or to pay damages on default of shipment; that though the shipment was not limited by the contract to a shipment from the United Kingdom, Regn. 30 A. of the Defence of the Realm Regulations prohibited export of aluminium from any foreign country by a British subject; that the sellers had used reasonable diligence to obtain a licence to ship but failed and that consequently before there was any default on the part of the sellers, the further performance of the contract became illegal and the defendants were not liable in damages.

New Zealand Shipping, Co., and Societies Des Ateliers et Chantiers De France, *Inre*: (1917) 2 K. B. 717 C. A.

Contract—Construction—Contract to be "void" on a certain contingency—Effect of—Party cannot take advantage of his own wrong—Scope of the rule.

When a contract contains a provision that it is to become 'void' in a certain event, it becomes void and not voidable on the happening of that event. But a party who is alleging that the contract is void cannot rely on his own default or wrong in order to bring into operation the clause making the contract void.

Huntley (Marquis), *In re*: **Goldstein,** *Exparte* (1917) 2 K. B. 729.

Bankruptcy—Courts to act in aid of each other—Scope of the rule—Transfer of ordinary business by County Court to High Court—Bankruptcy Act, 1914, S. 122.

S. 122 of the Bankruptcy Act which provides for Bankruptcy courts assisting each other in the work of bankruptcy, was passed to enable one court to assist another in dealing with matters within the jurisdiction of the court asked to act, but not so as to authorise a matter proper to be dealt with by the requesting court to be sent for trial by another court.

Harrisons and Crossfield *v.* **London and N. W. Railway** (1917) 2 K. B. 755.

Carrier—Liability of—Negligence—Theft by servant—Prosecution by carrier—Effect of—Estoppel.

The plaintiffs, a firm of tea-merchants sent a consignmen

note to their wharfingers requiring them to deliver three chests of tea to the defendants, a railway company, for the purpose of carriage and delivery to certain purchasers.

A cartman who had been in the service of the railway company, but who at the time was on sick-leave, appeared in uniform with a horse and cart of the railway company, demanded and received the tea but converted it to his own use. The railway company successfully prosecuted the cartman for larceny. In an action by the plaintiff's against the defendants for breach of duty as common carriers:

Held, that in the absence of proof of negligence, the defendants were not liable, inasmuch as they had not ratified the possession of the cartman under a contract of carriage, though by prosecuting him they might have recognised his *de facto* possession of the tea.

H. O. Brandt and Co. *v.* **H. N. Morris and Co., Ltd.** : (1917) 2 K. B. 784.

Contract—Construction — Principal and agent—Contract signed by person without qualification—Right to sue on contract —Contract for delivery of goods by instalments—Breach—Assessment of damages.

When a man signs a contract in his own name he is *prima-facie* a contracting party and liable, and there must be something very strong on the face of the instrument to show that the liability does not attach to him.

In a suit for damages for breach of a contract to deliver goods by instalments the time for assessing the damages would ordinarily be the date fixed for each delivery.

In re **A debtor.** (1917) 2 K. B. 808.

Bankruptcy—Incorporated company—Resolution giving general authority to officer to present petition—Act of bankruptcy after resolution—Bankruptcy Act, 1914 S. 149.

It is competent to an incorporated company to give a general authority to one of its officers to present petitions in bankruptcy in respect of acts which might be committed in future, after the authority was given.

C. Sharpe & Co. v. Nosawa & Co. (1917) 2 K. B. 814.

Damages—Contract for sale of goods—C. I. F. Contract—Breach—Time for measuring damages—Arrival of goods or of shipping documents—Sale of goods Act. 1893, *S.* 51 *Sub. S.* 3.

A C. I. F. contract for sale of goods is performed by the vendor taking reasonable steps to deliver as soon as possible after shipment, the shipping documents including the bill of lading and policy of insurance, and the buyer paying the price against the documents unless there is some other stipulation as to payment in the contract. But performance by the seller is by delivery of the documents which represent the goods (*i.e.*) the bill of lading, which is a constructive delivery. In a suit for damages for breach of such a contract, the damages have to be measured by the difference between the contract price and the market price on the date when the shipping documents would, if sent forward with reasonable despatch, have reached the buyer and not on the date when the goods ought to have been physically delivered to the buyer.

Armstrong v. Jackson: (1917) 2 K. B. 822.

Contract—Rescission—Executed contract—Fraud-Decrease in value—Relief when granted—Fiduciary relation—Principal and agent—Broker, duty of.

Where a vendor has procured the sale of his property by misrepresentation the purchaser can set aside the contract of purchase, prior to completion, even though the misrepresentation be innocent. But if the contract has been executed by the completion of a conveyance or lease, or the formal assignment of a chattel, then rescission cannot be obtained on the ground of innocent misrepresentation by the vendor or lessor. When the contract is so completed, fraud must be proved before rescission can be granted.

A broker who is employed to buy shares cannot sell his own shares unless he makes a full and accurate disclosure of the fact to his principal, and the principal, with a full knowledge, gives his assent to the changed position of the broker. Where however the principal buys in ignorance of the fact, he is entitled to rescind the sale notwithstanding the fact that he took a formal transfer of the shares and became the registered holder thereof

or that the value of the shares had diminished considerably between the date of the sale and the date of the action for rescission.

Mousell Brothers *v.* London and N. W. Ry., Co. (1917) 2 K. B. 836.

Criminal Law—Vicarious liability—Mens rea—Necessity of—Rule—Exception.

By the general principles of the Criminal Law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea,* and therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be criminally liable for an offence committed by his servant. But it may be the intention of the Legislature in order to guard against the happening of the forbidden thing, to impose a liability or even a personal penalty upon a principal even though he does not know of, and is not a party to, the forbidden act done by his servant. Many statutes are passed with this object. Examples of such statutes given in the judgment of Viscount Reading, C. J.

Morrison *v.* Lord Mayor, etc., of Sheffield: (1917) 2 K. B 866.

Tort—Local authority—Trees planted in highway and protected by spiked guards—Injury to lawful traveller—Lighting prohibited under Defence of Realm Regulations—Public Health Act, 1890 *S.* 43.

The defendants, an urban authority, acting under the provisions of S. 43 of the Public Health Acts planted trees in a highway and surrounded each tree with an iron spiked guard. Sometime after, all street lights were ordered to be extinguished in pursuance of an order under the Defence of the Realm Regulations. The plaintiff who was travelling along the road at night came into contact with a spike and sustained serious injuries. In an action by the plaintiffs for damages, *held,* that the defendants were negligent in having omitted to take reasonable precautions to prevent the guard from being a danger to the public lawfully using the road and that they were liable in damages.

Hayward v. Drury Lane Theatre, Ltd. (1917) 2 K. B. 899.

Master and servant—Injury to servant in course of employment—Volunteer with interest—Liability of master for negligence of servant.

The defendants were a theatrical company who were preparing for the production of a revue. The plaintiff a dancer, was present at the rehearsals of the revue though she was under no contract with the defendants to attend them and was not paid for her attendances, but merely attended in the hope and expectation of obtaining an employment for the run of the revue when it was ready for production. At one of such rehearsals a stair-case was fixed upon the stage by the direction of the producer of the revue by a servant of the defendants, who however fixed it in such a way as to be unsafe. The plaintiff took up a position on the stair case by the direction of the producer, when the staircase collapsed and the plaintiff sustained severe injuries. In a suit to recover damages, *held* that the plaintiff was not a servant of the defendants nor a mere volunteer who could not be in a better position to recover damages from the defendants than their own servants, but was a volunteer in a service in which she had a common interest with the defendants. The doctrine of common employment had no application to the case and the plaintiff was entitled to recover damages.

Brodie v. Brodie (1917) P. 271.

Restitution of conjugal rights—Action for—Defence to—Agreement to live separate entered into before marriage and confirmed thereafter—Public policy—Void.

In answer to an application for restitution of conjugal rights the husband pleaded an agreement entered into before the marriage ceremony and confirmed by an indorsed agreement signed thereafter, under which it was provided that the parties might live apart if they pleased.

Held, that the two documents formed one agreement which was void as being opposed to public policy and that the agreement afforded no defence to the wife's petition. The first agreement being illegal at its inception and therefore void, could not be confirmed by the second.

Talbot v. Jevers (1917) 2 Ch. 363.

Crown—Forfeiture—Conviction for felony—Vested interest in personal estate directed to be applied in purchase of land.

The equitable doctrine of national conversion of land into money or money into land has no application to the rights of the crown in cases of forfeiture, escheat or bona vacantia. The vested interest of a person convicted of felony before 33 and 34 Vict. C. 23 in personal estate directed to be applied in the purchase of land is forfeited to the crown.

JOTTINGS AND CUTTINGS.

The Engagement Ring. On another page a recent English decision of Shearman, J., is noted to the effect that when an engagement ring is given by a man to a woman, there is an implied condition that the ring shall be returned if the engagement is broken off. The learned Judge in the course of his jndgment says:—

"The history of the engagement ring is interesting. We read in the Book of Genesis that Abraham presented earrings when Rebecca was betrothed to Isaac; and, no doubt, the story represents the ring in those days as a sign or symbol of an agreement to carry out a bargain and sale of the woman. When one comes to the time of civilised law, the woman ceases to be a chattel, and one finds in Justinian the ring used as an *arrhabo*, or a pledge for the contract of marriage or *sponsalia*. This found its way even into early English law. Times, however, are changed now; but, though the origin of the engagement ring has been forgotten, it still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it."

We may supplement what Shearman, J., says by adding that espousal among the Anglo-Saxons was concluded by the delivery of a ring, which the Anglo-Saxons Dooms called in the Vernacular a "wed". The exchange of rings was the "wedding". The parties might afterwards be affianced to each other in the presence of the Church. Now-a-days, as Professor Jenks points out in his *Law and Politics* in Middle Ages, we reverse the order of things. The ring is given at what we understand by the "wedding." But the engagemeut ring survives to mark the ancient rule. Any contract in Anglo-Saxon times was a "wedding;" any breach of

contract was "wed-bryce". "And first we teach," say the Dooms of Alfred, "that every man hold to his oath and his wed," that is, to his pledge :—*The Canadian Law Times for October 1917.*

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Chops and Tomato Sauce :—In the summer of 1836 a *crim. con.* action was brought by one Norton, the husband of one of the most beautiful of the Sheridan sisters, against Lord Melbourne who was then Prime Minister. Sir William Follett, who was of counsel for the plaintiff, offered certain letters in evidence against Lord Melbourne. One was in the following terms : "How are you ? I shall not be able to call to-day, but probably shall to-morrow. Yours, &c., Melbourne." And another ran : "There is no house to-day ; I will call after the levee, about four or half past. If you wish it later let me hear from you. I will then explain to you about going to Vauxhall, Yours, &c., Melbourne."

Sir William described these letters as "the most important the most tell-tale, the most damnatory". That they failed of their effect is proved by the fact that Lord Melbourne was triumphantly acquitted by the jury. It is now generally believed that Charles Dickens who, at that very time, was writing the Pickwick Papers modelled himself upon these letters when he made Mr. Pickwick write to Mrs. Bardwell : "Garraway's twelve o'clock. Dear Mrs. B, chops and tomato sauce, Yours Pickwick", and again, "Dear Mrs. B., I shall not be at home till to-morrow, Slow coach. Don't trouble yourself about the warming pan." Who, even writing fiction, would have dared to make his imaginary counsel put forward such evidence? But Dickens was merely ridiculing what Follett had done in solemn earnest! It will be remembered that the Pickwick Papers were dedicated to Mr. Serjeant Talfourd. He was counsel for the defendant in the Norton case. It was the Serjeant who indirectly contributed the germ of the joke which so greatly entertained the friends of Mr. Peter Magnus. Serjeants junior to Thomas Noon Talfourd, whose name was last on a particular list of the members of the order, were known in the Common Pleas as "Afternoons":—*Canada Law Journal, Aug.—Sep.* 1917.

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Judicial Salaries :—Sir Edward Coke (Chief Justice of the King's Bench in 1613) had £224-19-6 a year, the contemporary Chief Justice of the Common Pleas £161-13-4, and the judges

£154-19-8 together with a circuit allowance of £33-6-8. At the same time the salary of the Chief Baron of the Exchequer was £154-19-8; the Baron's annual £133-6-8 being supplemented by 'fees.' The following century saw the judges increasing apace in affluence. In the reign of George I the salaries of the 'chiefs' went up from £1,000 to 2,000 and those of the judges from £1,000 to 1,500. By this time, however, it had been customary for the judges to receive certain perquisites, presents and fees, which agreeably supplemented the official pay. Sugar loaves from the Warden of the Fleet and the prothonotaries, dedimus money from the cursitors, fees from the clerk of the warrants and from the enrolment office were all to be expected. By the 19 Geo. 3, c. 35, a yearly £500 was added to the Chief Baron's pay, and £400 to the puisne judges' and Barons'; and twenty years afterwards the 39 Geo. 3, c. 110. refixed the salaries as follows: Master of the Rolls, £4,000; Chief Baron £4000.; and puisne judges and Barons, £3,000. The same statute gave these pensions: the Lord Chancellor, £4,000; the Chief Justice of the King's Bench, £3,000; the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, £2,500 each; and the Judges and Barons, £2,000.

A statute of 1809, (an Act for further augmenting the salaries of certain of the Judges of the Courts in Westminster) increased the Chief Baron's pay to £ 5,000, and that of the Judges and Barons to £ 4,000.—the 'second judge' receiving a further £ 40 for charging the Grand Jury each term aud pronouncing judgments on malefactors. The reign of George IV saw the Judges placed on a pinnacle from which they quickly descended. By the passing of 6 Geo. IV, cc. 82, 83 and 84, the Chief Justice of the King's Bench, the Chief Justice of the Common Pleas, and the Master of the Rolls found themselvss with salaries of £ 10,000, £ 8,000 and £ 7,000 respectively. The Chief Baron by the same Act was advanced to £ 7,000, the Vice-Chancellor of England had £ 6,000; and the Judges and Barons of the Exchequer £ 5,500. Pensions were fixed as follows—£ 4,000 for the Chief Justice of King's Bench; £ 3,750 for the other two 'Chiefs', the Master of the Rolls and the Vice-Chancellor of England; and £ 3,500 for the Judges and Barons.

Had it not been for the opposition of Brougham, the Judges and Barons might have fared even better, for £ 6,000 was the

annual salary proposed when the Act was in its early stages. From a pension of £ 2,800 which the framers of the measure had considered adequate, they were saved by the exertions of Scarlett. Various odd facts and arguments were contributed by legal debaters during the passing of the Bill. The reason for the increase of the Judge's salaries in 1809—the inflated prices of commodities—had ceased to operate; Justice Buller, who had become a Judge at the age of thirty-two, had accumulated a large fortune on the Bench; and Mr. Baron Wood, notwithstanding the loss of the sight of one eye and hearing of both ears, had clung to the Bench rather than retire into pensioned poverty.

The golden age was only of a few months' duration. An arrangement was come to in November, 1828, that newly appointed Judges should agree to accept £ 5,000 instead of the statutory £ 5,500; and the reduced amounts became the regular judicial salary by the 2& 3 Will. IV. c. 116. The same Act took £ 2,000 from the Chief Justice of the King's Bench, £ 1,000 from the Chief Justice of the Common Pleas, and the additional £ 40 a year from the 'second judge.' Untouched by this statute, the Master of the Rolls retained his £ 7,000 a year till 1851, when he was reduced to £ 6000.

The Salaries so settled in the reign of William IV have survived unaltered. Meanwhile, the Country Court has come into existence, and it has been ascertained that the offer of £ 1,500 a year will tempt practising barristers of position to accept judicial rank. Also it is common knowledge that the number of 'silks' who, under present conditions, make an income at the Bar of £ 5,000 a year is so insignificant as to be almost negligible. These are considerations which may, if some reformers have their way, induce Parliament, when the subject next comes to be discussed, to revive the existing scale:—*The Law Journal, October, 1917.*

CONTEMPORARY LEGAL LITERATURE.

In the "*Law Quarterly Review*" for October, 1917, Mr. Harold Hazeltine gives an account of the Law Schools and Legal Practitioners in the United States of America. American history falls into three periods. The colonial period, *i.e.*, from 1606 to about 1760, the Revolutionary period (1760-83) and the National period (1783—to the present day). During the first period

although the Royal charters declared that colonial laws should conform as nearly as possible to the law of England each colony developed its own body of law suited to its own peculiar needs. The Law as enacted and enforced by them was popular Colonial law as distinct from the complex and technical system of lawyer-made law in contemporary England. The factors that contributed to such a state of affairs were the following. The primitive conditions of life obtaining gave rise to a tendency to revert to archaic principles or to introduce novel legal solutions. So too dissatisfaction with English institutions led to some divergence. In some of the New England colonies puritan influence told. Wide discretionary powers were exercised by judicial tribunals. This led to considerable departure in legal practice. In addition to all these, there was an utter absence of trained lawyers who made their appearance only in the latter part of the 17th and the beginning of the 18th century. As complex economic situations arose need was felt for a trained Bar, and with them came the English law and English procedure. The gradual transformation of chartered colonies into Royal provinces also had an important influence in bringing them in. Though each state law had its own peculiar feature all of them developed more or less after the English model and generally agreed. By the time of the revolution, lawyers had largely displaced laymen on the Bench and the bar had so far advanced in learning and influence that Burke referred to them in terms of great eulogy. English trained barristers founded Law Schools which formed centres of legal learning and many young men travelled to England to study law. The procedure adopted by aspirants to the legal profession was either to qualify for the English Bar or to read law in the offices of Court clerks or of Colonial practitioners. Towards the close of the revolutionary period the Americans paid greater attention to systematic instruction in their own country and established several professorships in law. The dual system of Government led to a dual system of law. On the one hand there is the federal law, and on the other there are the numerous systems obtaining in the several states forming the Union. Although there is no federal common law, the federal courts in the exercise of their constitutional powers, frequently interpret and enforce State Common Law. The dual system has also led to a dual Bar—the Federal Bar and the numerous State Bars but all these bars have certain common characteristics inherited

from the English Bar. There are several Law Schools which deal with State Law, but the best schools teach the main principles of the Federal Law and the common principles of the State law and equity with due attention however to the peculiar features of each State law. This affords a particularly valuable training in methods of comparative law. There were once 4 grades of practitioners in America, Attorneys, Counsellors, Barristers and Serjeants. During the early 19th century, these distinctions were abandoned, except in New Jersey where even to-day only "Counsellors" have the right to appear in the highest Courts of the State. The existence of the various grades and certain other features, it is said, gave certain aristocratic air to the profession which has now declined and with it, the profession also seems to have declined and concurrently there has been laxity in the State Bar Examinations and enormous increase in the number of lawyers. As a result, the standards of State Bar Examinations and more effective disciplinary control have become two of the most pressing and important of all problems that now confront the profession there. The present requirements for admission to State Bars vary considerably. In Indiana, every voter of good moral character is entitled as of right to practice; at the other end stands New York where he must have studied law for four years before he is allowed to appear for the State Bar Examination. The State of Massachussets has recently reduced by statute school attendance for admission to the Bar to two years of study in an evening school. In general, the present standards for admission to the bar in respect of general education, legal study and character of Bar Examination papers are far too low. In 1910 there were 1,14,000 lawyers in the United States of America. In spite of all this the American Bar as a whole stands high in character learning and ability. The first Law School to be established was the Lichfield Law School in 1784. Harvard Law School was established in 1815-17. It became a leading school during the time of Story. The peculiarity of the American Law Schools is the case method of legal study. Since the civil war, there has been a phenomenal increase in the numbers and size of law schools. These schools are of 3 kinds—Correspondence, Night, and College and University Schools. Owing to the present low standards the first two kinds of schools flourish. In the Law Schools, there is every attempt

made to improve the level of culture and training. One of the important factors in the development in these schools is the influence of the Association of American Law Schools. The requirements for admission to law schools vary; good many requiring one or more years of collegiate pre-legal study, some two or three requiring the students to be graduates of colleges of high grade. The foremost schools require three years' residential legal study for the first law degree, and a fourth year's study for the advanced degree.

Sir Malcolm M'Ilwrath gives a summary of the arguments of contesting parties in France at the time of the passing of the provision of Divorce Law which provides that "when separation has lasted for three years, the judgment shall be converted into a judgment of divorce as of right, on the application of either spouses." There is a similar proposal in England which is influentially supported.

Mr. Charles Sweet continues his examination of restraints on alienation. He claims to have established that under the law, a restraint on alienation may be imposed if its object is lawful and reasonable. This doctrine explains the validity of options to purchase and rights of prescription. He shows that the decision of Jessel, M. R. in *In re Macleny* [1] that a restraint on alienation qualified in point of time or as to persons or as to the manner of alienation is good is opposed to authorities. He also shows that the rule against perpetuities which is really a rule against remoteness and applicable to future interests is by confusion, taken to be applicable to present interests, for instance trust for the maintenance of a tomb is said to be bad as opposed to the rule against perpetuities.

Professor Oppenheim discusses the legal relations between an occupying power and the inhabitants. The recognition of the *de facto* occupation in international law goes only to this extent, *viz.* that it makes the legitimate acts of the occupying power in the administration of the occupied territory binding on the lawful Government. But this does not involve the further duty on the part of the inhabitants to obey the occupier. He is no doubt bound to obey the laws of his own country in so doing he does not obey the occupant. Even the German Government seems to recognise this principle for justice is still administered by the Belgian courts in the name of the

1. L. R. 20 Eq. 185.

Belgian King. The Professor points out that the inhabitants are not bound morally or legally to support the occupant or not to betray his secrets though of course, if any inhabitant acts against the occupier though in accordance with the dictates of patriotism, the occupier may be within his rights to impose punishment for such act but the objection to the execution of Nurse Cavell is the inhumanity and the disproportionate nature of the punishment and not the want of authority to impose punishment.

In *the American Law Review*, Hon'ble George B. Rose points out the probability of attacks on the Constitution and the Judiciary by socialism and anarchism as a result of the war. He advises a study of the problems.

REVIEWS.

MUHAMMADAN LAW OF MARRIAGE AND DIVORCE, *by Ahmed Sukri, LL. B., Ph. D. Columbia University Press : New York.*

We are glad to acknowledge the receipt of the above book printed at the Columbia University Press and which forms the 7th of a series of contributions to oriental History and Philology. In this small volume of 126 pages the author has placed before the public, an admirable treatment of the subject from a purely scientific point of view of jurisprudence and demonstrated the high state of perfection which the Mahomedan Law had attained in the early centuries of the Christian era and which can compare very favourably with the Jurisprudence of any civilised country of the present day. In the opening chapter, the author gives a very interesting account of the sources of Mahomedan Law and its development under the great Mahomedan Jurists of the various Schools, next he deals with the legal view of marriage from the point of view of Mahomedan Jurists and compares it with that of other systems of law. In the course of this discussion, the author repudiates the view that is sometimes held that the Prophet either adopted or legalised polygamy in his system. After referring to the state of society in the various countries at the time, the author concludes by saying that the Prophet did not " insist that his followers should take many wives. As a statesman he recognised polygamy as an ethnic condition and he acted wisely in not interfering with it. Any innovation in this direction would have upset the entire fabric of Eastern Society and might have been fatal to Islam "; and in passing he also notices the qualification implied in the saying "But if you

cannot deal equitably and justly with all, you shall marry only one." The author then deals with the impediments to marriage by reason of consanguinity, affinity, occupation, &c. Next he refers to the formation of the marriage contract by the necessary proposal and consent. In the next chapter the author deals with "Dower," its nature, amount and time of payment. Dealing with the nature of Dower in Mahomedan Law, after referring to its analogies in other systems, the author says, "Whatever may have been its origin among the Arabs, Mahomedan jurisprudence refuses to recognise dower as price or even as consideration. Dower is a result of marriage imposed by law 'merely as a token of respect for its object, the woman'." The next part deals with the matrimonial relation and under it, the duties of the husband and the wife, &c.

In the last part, the author deals with the subject of Divorce. Hereafter referring to the other forms of repudiation by the husband, he says that the *Bid'i* form of divorce which is effected by three repudiations at anytime and without definite intervals is not approved and is regarded as heretical. It is said that it was not recognised by the Prophet and that it was strongly disapproved of by him.

We would heartily recommend this little volume for the use not only to students of law but also to general readers as giving an admirable exposition of the Mahommedan system of marriage and divorce.

LAW AS A CAREER *by S. Ambaravaneshwar, M. A., B, L., Pleader, Trichinopoly.*

This small pamphlet is the substance of an address delivered at the first anniversary of the Tiruvadi Bar Association with the Hon'ble the Advocate General in the chair.

The address deals in its short compass, with the scope and the usefulness of the lawyer and answers some of the criticisms which have been commonly directed against the lawyers and their influence on society at large. In the course of the address reference is made to the various qualities and attainments so difficult to combine in one individual which makes for success in the profession. We would recommed this pamphlet for the perusal of those who have the interest of the profession at heart.